Supreme Court, U.S.
FILED
OCT 7 1994

No. 94-0473

In The

Supreme Court of the United States

October Term, 1994

GEORGE GILMORE MARTIN and JULIA S. MARTIN,

Petitioners,

vs.

BANK OF FLOYD,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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TO THE HONORABLE SUPREME COURT:

The Respondent, Bank of Floyd, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners George Gilmore Martin and Julia S. Martin.

OPINIONS BELOW

The Circuit Court for Roanoke County, Virginia, entered its Final Order in this case on December 9, 1993. The case number is 92-95. The Virginia Supreme Court denied the Martins' Petition

for Appeal and subsequent Petition for Rehearing. None of these opinions are published. They are reproduced in the appendix to the Martins' Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Respondent respectfully avers that Petitioners' Statement of the Case is replete with allegations of collusion among members of the Virginia judiciary, allegations which are irrelevant and immaterial to the facts at issue. Further, while Petitioners' Statement correctly states that the Petitioners sought to introduce evidence at trial and were denied, it fails to state the reasons therefore. In an attempt to clarify the record, Respondent submits the following "Statement of the Case." All references are to the Record or Transcript of Trial ("Tr.").

On May 15, 1990, George Gilmore Martin and Julia S. Martin (hereinafter the "Martins") executed an interest-bearing note in favor of the Bank of Floyd (hereinafter the "Bank") in the principal amount of $630,000. According to the terms of the note, payments were to be made in 24 consecutive monthly installments of principal and interest, beginning June 15, 1990, with the entire unpaid balance due May 15, 1992. The note also provided for continuing interest until paid, plus the payment of collection costs and attorneys' fees in the amount of twenty-five percent (25%) of the outstanding balance (Tr. 114-115). The note was secured by a deed of trust bearing the same date and recorded in the Clerk's Offices of the Circuit Courts for both the County of Roanoke and the City of Salem.

The Martins defaulted on the note and the deed of trust securing the note was subsequently foreclosed on in early December, 1991. The outstanding balance on the note as of that time was $641,754.45. The real property, the majority of which was purchased by the Bank at the foreclosure sale, brought

$482,561.88. The proceeds of the sale were applied to the balance due on the note, leaving a deficiency of $159,192.57 as of December 4, 1991 (Tr. 116, 152-153, 161).

On March 6, 1992, the Bank filed suit in the Circuit Court of Roanoke County against the Martins for the deficiency, plus interest and attorneys' fees as provided for in the note (Record 1-7). The Martins retained counsel and, with leave of court, filed a late Answer and Grounds of Defense to the Motion for Judgment. In their Answer, the Martins admitted that they executed the May 15, 1990 note, with the terms as alleged in the Motion for Judgment, but denied that they owed the Bank any additional monies. The Martins did not challenge the validity of the foreclosure, nor did they raise any issues regarding due process. Even through entitled "Answer and Grounds of Defense", the Martins' responsive pleading merely denies the allegations contained in paragraph 4 of the Motion for Judgment regarding the issue of the note's being in default, and further denies "each and every allegation not specifically admitted herein" and demands "strict proof of each such allegation" (Record 15-17).

On the morning of October 15, 1993, prior to the commencement of the trial,[1] the court entertained preliminary motions. The Martins moved for a continuance, stating that discovery was not complete and that they were not represented by counsel and therefore could not receive a fair trial. The court overruled the motion, and, in a rather lengthy explanation of its reason, informed the Martins that there was a general denial to the Motion for Judgment, that no affirmative defenses were filed, that no objections to discovery were filed, that the case was ready for trial and that the case would be tried according to the pleadings as

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1. The case was originally set for trial by jury on July 20, 1993, but was continued until October 15, 1993, at the request of counsel for the Martins who sought leave to withdraw from the case (Record 57-58).

filed.[2] The court further stated that the Martins had had ample time to retain counsel (Tr. 13-35). The Martins then moved the court for a continuance on grounds that the Bank had failed to produce a witness list prior to trial after being so requested, maintaining that this failure prejudiced them by denying them time to prepare cross examination. The court overruled this motion, but stated that it would grant the Martins an opportunity to interview any witness whom they considered a surprise (Tr. 35-42, 48-49). Finally, the Martins moved that the trial judge recuse himself in that he would not be fair and impartial and the Martins' rights guaranteed by the Fourteenth Amendment would be violated. This motion, too, was overruled. The court noted the Martins' exceptions to its rulings (Tr. 50-53).

Upon conclusion of the preliminary motions, a jury of seven was selected. The Martins objected to the panel, stating that they could not get a fair trial in Roanoke County. The court noted their objection for the record (Tr. 101).

For its case in chief, the Bank called its president and chief executive officer, Leon Moore, as its only witness. Moore's testimony corroborated the allegations contained in the Bank's Motion for Judgment: the Martins had executed a note in favor of the Bank; they had defaulted in the payment of that note; the outstanding balance on the note as of December 4, 1991 was $641,754.45; the deed of trust securing the note was foreclosed on the real property sold, resulting in total credits to the Martins' account of $482,561.88; the proceeds from the sale plus the other credits for payments made to the Martins' account did not fully repay the debt incurred, resulting in a deficiency of $159,192.57; the note called for continuing interest until paid, and said interest, from December 4, 1991, through October 15, 1993, was computed

2. At no time, during either preliminary motions or trial, did the Martins request leave of court to amend their Answer so as to include affirmative defenses.

to be $10,990.70; and the terms of the note also provided for attorneys' fees in the amount of 25% of the unpaid balance, which were computed to be $42,545.82 (Tr. 114-117, 151-154, 160).

At the conclusion of the Bank's case in chief, the Martins moved for a directed verdict, stating that the Bank had not proved its case. The court overruled the motion. The Martins' exception to its ruling was noted for the record (Tr. 163-166, 170, 186).

Prior to presenting any evidence and out of the presence of the jury, the Martins proffered evidence regarding the reasonableness and validity of the foreclosure sale (Tr. 173, 175-183). Counsel for the Bank objected (Tr. 174, 183-185). The court sustained the Bank's objection, finding that the issues the Martins currently were questioning were not properly before the court in that they had not been raised by the pleadings (Tr. 170-171, 186-187).

In their defense, the Martins introduced a year-end loan history indicating a zero principal balance on their loan. Moore, who was the only witness to appear on the Martins' behalf, testified that the loan history, which was issued after the foreclosure sale, was a standard accounting procedure of the Bank, showing the amount written off the Martins' account in order to zero their account and transfer the balance to the Bank's records (Tr. 157-159).

The Martins also introduced credit memos totalling $644,115.14. Moore explained that the amount of the credits actually applied to the Martins' account did not add up to the $644,115.14 (Tr. 203-205). He further testified that the credit memos were the internal transactions through which the Bank cleared the Martins' account and that they in no way reflected actual cash received from or on behalf of the Martins (Tr. 216). Referring to his notes on the payment history, Moore stated that the last payment made by the Martins was received in May of 1991,

leaving a balance of $594,495 in principal, plus interest and late fees (Tr. 209-210). Then, when the property was foreclosed on in December, 1991, the net sales amount of $482,561.88 was applied to the balance due on the note, leaving a deficiency of $159,192.57 (Tr. 217, 214).

At the conclusion of the Martins' evidence, counsel for the Bank moved to strike, stating that the Bank had proved its case and that there were no facts in issue for the jury to determine (Tr. 234-236). The court sustained the motion, finding that the Martins were indebted to the Bank in the principal amount of $159,192.57 together with interest at 8% which was calculated to be $10,990.70. The court declined to rule on the matter of attorneys' fees at that time, requesting that each party submit a letter to the court on that issue. The Martins duly objected to the court's ruling and their objection was noted for the record (Tr. 239-242).

On December 9, 1993, after reviewing the respective letter briefs on the matter of attorneys' fees and hearing oral argument, the court entered its final judgment order awarding the Bank the sum of $170,183.27 principal and interest through October 15, 1993, and attorneys' fees in the amount of $42,545.82. The Martins objected to the entry of the final order, and timely filed a Notice of Appeal to the Supreme Court of Virginia (Record 184-186, 193).

In their Petition for Appeal, the Martins contended that the trial court committed reversible error when it failed to grant their motion for summary judgment at the conclusion of the Bank's evidence. They raised two questions regarding due process in support of their contention. These questions are recited in the Martins' Petition for Writ of Certiorari on pages 35 and 36.

The Bank, in its Brief in Opposition to the Petition for Appeal, maintained that the trial court properly denied the Martins' motion for summary judgment in that at the conclusion of the plaintiff's

evidence there were still material facts in dispute. Regarding the due process questions, the Bank maintained that the Martins' arguments were without merit because these issues were never raised prior to trial.

Upon review of the Record and consideration of the arguments of both parties, the Supreme Court of Virginia found no reversible error and denied the Petition for Appeal. The Martins' Petition for Rehearing was also denied.

On June 22, 1994, the Martins filed a Notice of Appeal of their intention to appeal this case to the United States Supreme Court. On August 10, 1994, counsel for the Bank received a copy of the Martins' Petition for Writ of Certiorari, which was refused by the clerk for being in improper form. On August 30, 1994, counsel for the Bank received another Petition from the Martins. Apparently, this Petition, too, did not conform to the requirements of the Rules of the Supreme Court of the United States, in that on September 15, 1994, counsel for the Bank received yet another Petition from the Martins which was postmarked September 12, 1994. This Petition did not contain a Certificate of Service and the content thereof contained substantial changes from the prior two Petitions. In each instance, counsel received only one copy of the Petition.

SUMMARY OF ARGUMENT

I. This case presents no substantial federal question for review and so fails for want of jurisdiction.

II. The questions presented by Petitioners were not properly before the trial court and cannot be raised for the first time on appeal.

III. Because Petitioners have failed to comply with the provisions of Rules 13 and 33 of the Rules of the Supreme Court of

the United States their Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. and II.

This case presents no substantial federal question for review. It concerns an action at law for a deficiency on a note. The dispute arises over procedural, rather than substantive, issues.

Simply stated, the Respondent filed a Motion for Judgment against the Petitioners. The issue was joined when the Petitioners filed an Answer and Grounds of Defense. Petitioners' responsive pleading constitutes nothing more than a general denial to the allegations contained in the Motion for Judgment. It raises no defenses whatsoever.

Among the grounds for denial of a writ of certiorari is that the lower court's decision may be supportable as a matter of state law. *Maryland v. Baltimore Radio Show,* 388 U.S. 912, 94 L. Ed. 562, 70 S. Ct. 252 (1950). In order to raise a federal question, the federal and constitutionally guaranteed rights allegedly infringed upon must be asserted according to state procedure. *Cousins v. Wigoda,* 419 U.S. 477, 21 L. Ed. 2d 595, 95 S. Ct. 541 (1975); *Atlantic C.L.R. Co. v. Mims,* 242 U.S. 532, 61 L. Ed. 476, 37 S. Ct. 188 (1917); *Louisville & N.R. Co. v. Woodford,* 234 U.S. 46, 58 L. Ed. 1202, 34 S. Ct. 739 (1914).

Regarding Virginia procedure, Rule 1:4(d) of the Rules of the Supreme Court of Virginia, 1950 Code of Virginia, states:

> Every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the

> opposite party of the true nature of the claim or defense.

Further, the purpose of the grounds of defense is to apprise the plaintiff of the defenses upon which the defendant intends to rely. *Lumbermen's Mutual Casualty Co. v. Hodge,* 205 Va. 36, 135 S.E. 2d 187 (1964); *Stegal v. Union Bank, Etc., Trust Co.,* 163 Va. 417 (1934). A defendant cannot set up a defense which has not been stated with sufficient particularity so as to advise the plaintiff thereof. *Stegal, supra.* Pleadings are as essential as proof; no relief can be granted if same does not substantially accord with the case as made in the pleadings. *Ted Lansing Supply Co. v. Royal Aluminum & Construction Corp.,* 221 Va. 1139, 277 S.E. 2d 228 (1981); *Potts v. Mathieson Alkali Works,* 165 Va. 196, 181 S.E. 521 (1935). In not allowing the Petitioners to introduce certain evidence regarding the foreclosure sale and the attorneys' fees, the trial court was simply following established principles of practice and procedure. It did not commit reversible error because the Petitioners never met the threshold requirements relative to pleadings.

III.

Petitioners have failed to comply with the provisions of Rules 13 and 33; their Petition should be denied.

On June 10, 1994, the Supreme Court of Virginia denied the Petition for Rehearing. On August 10, 1994, counsel for Respondent received one copy of the Martins' Petition for Writ of Certiorari. Thirty-nine of the forty copies, as well as a copy of the Rules, were returned by the Clerk for failure to comply with the Rules of Court. On August 30, 1994, counsel for Respondent received one revised copy of the Petition. The text of this revised Petition contains one sentence which was not in the original. On September 15, 1994, counsel for Respondent received one copy of

yet another revised Petition. The text of this second revised version deviates substantially from the prior submissions in that an entire section (Section H., pages 32-36) has been added.

Rule 33.7 of the Rules of this Court states that the clerk shall refuse any document which does not comply with the printing requirements. Any document so refused shall not be deemed untimely if promptly resubmitted in proper form. The underlying presumption is that the revised document shall differ from the original only in form; it shall not contain new and/or different text. Theoretically, if this were not so, one could knowingly dash off an improperly prepared Petition for Writ of Certiorari on the last day of the filing period, have same rejected by the Clerk pursuant to the provisions of Rule 33.7, then resubmit another Petition containing more detailed information than the original and still be timely filed. This process could conceivably be repeated to the extent that the final version of the Petition no longer bears a resemblance to the original Petition. These sorts of actions are a burden on and prejudicial to the Respondent when he is formulating a thorough and proper Brief in Opposition to the Petition.

Interestingly, this appears to have happened in the case at bar. Three separate Petitions have been submitted in this case. The original and the first revision are essentially the same, and were filed within the time limits set forth in Rule 13 of the United States Supreme Court Rules. The second revision, however, differs substantially from the first two submissions and contains additional material. Further, this edition was postmarked September 12, 1994. If, indeed, this final edition is a separate and distinct Petition, and it is Respondent's contention that this is so, then the Petitioners missed the filing deadline by four days. Rule 13, sections .1 and .4.

CONCLUSION

Based on the arguments more particularly set out in the foregoing section, the Respondent respectfully requests the following:

1. that this Court deny the Petition for Writ of Certiorari;

2. that the Respondent be awarded its costs and fees associatd with this Court; and

3. that sanctions be assessed against the Petitioners for failure to comply with the Rules of this Court.

Respectfully submitted,

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